

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Toll Free Service Access Codes) CC Docket No. 95-155

PETITION FOR PARTIAL RECONSIDERATION

MCI Telecommunications Corporation ("MCI"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. 1.106, hereby petitions for partial reconsideration of the *Fourth Report and Order* in this proceeding.¹

INTRODUCTION

In the *Fourth Report and Order*, the Commission decided that while "vanity" numbers in the 888 code will continue to be assigned pursuant to a right of first refusal, vanity numbers in the 877 toll-free code and future toll-free codes will be assigned on a first-come, first-served basis.² MCI strongly supports the Commission's decision to have 888 vanity numbers assigned pursuant to a right of first refusal, but respectfully submits that the Commission's decision to assign vanity numbers in subsequent toll-free codes on a first-come, first-served basis does not serve the public interest.

A first-come, first-served approach to assignment of toll-free vanity numbers—a "mad rush" for numbering resources—fails to meet the Commission's own numbering policy objectives. The *Fourth Report and Order* decision is contrary to industry experience and FCC precedent in setting aside vanity numbers within the 888 toll-free code, discriminates against existing holders of vanity numbers, and fails to distinguish between toll-free access codes and

¹ *Toll Free Service Access Codes*, Fourth Report and Order and Memorandum Opinion and Order, CC Docket 95-155, FCC 98-48, (rel. March 31, 1998), 63 FR 16440 (Apr. 3, 1998) ("Fourth Report and Order").

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subscriber 800 codes. Most importantly, as expressed by Commissioner Furchtgott-Roth in his dissenting opinion,³ the *Fourth Report and Order* will jeopardize substantial previous investments in toll-free numbers, thus thwarting future capital investment in this rapidly growing segment of the telecommunications marketplace.

For these reasons, MCI urges the Commission to reconsider its decision, heed the advice of Commissioner Furchtgott-Roth and conclude that all subsequent vanity number assignments should be assigned pursuant to a right of first refusal. In any event, the Commission should, at the very least, modify the *Fourth Report and Order* to adopt a right of first refusal approach to vanity numbers that are used as toll-free access numbers, such 1-877-COLLECT (which MCI was unable to obtain even at the opening of the 877 toll-free code) and 1-877-CALL ATT.

DISCUSSION

I. THE COMMISSION SHOULD RECONSIDER ITS ILL-CONCEIVED FIRST-COME, FIRST-SERVED ALLOCATION PROCESS FOR 877 TOLL-FREE NUMBERS

A. At A Minimum, the Commission Should Order that Vanity Toll-Free Access Numbers Be Assigned Pursuant to a Right of First Refusal

MCI has fundamental objections to the concept of first-come, first-served allocations for “vanity” toll-free numbers in general, and believes that the best course is for the Commission to adopt a right of first refusal for all toll-free vanity numbers. At the very least, however, MCI urges the Commission to adopt a right of first refusal method for toll-free vanity access numbers, such as 1-800-COLLECT and its successors, that carriers have used to offer new telecommunications access services and for which multi-million dollar investments in brand recognition, goodwill and end user dialing patterns have been made in the highly competitive interexchange marketplace.

² *Fourth Report and Order* at ¶ 3.

The Commission has long recognized the fundamental differences between toll-free subscriber and access numbers.⁴ For instance, unlike subscriber 800 calls, access 800 calls are not completed merely on termination of the 800 call, but rather only upon connection of the calling party with the called number. This indicates, as the Commission has reasoned, that access 800 numbers merit different regulatory treatment, for instance with regard to payphone compensation, to accord with their different function as a means of network access.⁵ Furthermore, applying the right of first refusal only to vanity numbers used for interexchange access would greatly reduce any efficiency or fairness concerns associated with this approach, and would be entirely consistent with the limited right of first refusal exception the Commission applied to 888 vanity numbers.

A first-come, first-served approach to the assignment of vanity numbers used for access code calls jeopardizes the procompetitive role that toll-free access codes play. In October 1990, Congress enacted the Telephone Operator Consumer Services Improvement Act ("TOCSIA") which, *inter alia*, directed the Commission to establish 800 access numbers to promote competitive alternatives to large operator service charges being imposed by payphone operators.⁶ Largely as a result of, and in reliance on, TOCSIA and subsequent Commission actions, carriers such as MCI began to develop toll-free access numbers to provide competitive calling alternatives to consumers. Some of these, such as MCI's 1-800-COLLECT service, have broken new ground in customer convenience, pricing and rapid service growth.

³ *Fourth Report and Order*, Dissenting Statement of Commissioner Harold Furchtgott-Roth.

⁴ *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (1996).

⁵ *Id.*

⁶ 47 U.S.C. § 226(e).

Standing in stark contrast to TOCSIA, the Commission's recent decision to adopt a first-come, first-served assignment process will deter legitimate toll-free access number development and undermine the congressional desire that carriers invest in toll-free access numbers. The Commission should not now jeopardize these competitive alternatives by deterring carriers from investing in access number development, as warned by Commissioner Furchtgott-Roth.⁷ Nor should it enable unscrupulous entities to obtain access numbers that consumers today associate with low-priced alternatives, and then charge excessive rates for calls using those numbers. This would have the undesirable effect of enabling some carriers to mislead consumers, and reduce consumer confidence in existing toll-free access numbers as cost-effective calling alternatives.

As in the case of the exception for toll-free vanity numbers in the 888 code, applying a right of first refusal to toll-free 877 access numbers would be more equitable than a first-come, first-served method. There is simply no legitimate argument that allowing other carriers to piggyback on the access 800 investment of MCI in 1-800-COLLECT is an equitable method of assigning these commercially valuable numbering resources. A right of first refusal for toll-free access numbers would not raise the potential inefficiencies and administrative burdens that the Commission believes would result if applied to all vanity numbers. Indeed, applying a right of first refusal to toll-free access numbers would affect a limit amount of numbers, likely less than a few thousand, and would thus not have any measurable impact on the efficiency of toll-free number assignments.

Accordingly, the Commission should, at the very least, revise the *Fourth Report and Order* to allow existing toll-free numbers used for interexchange access to be assigned under a right of first refusal in the 877 and subsequent toll-free codes. To ensure that carrier rights are

⁷ *Fourth Report and Order*, Dissenting Statement of Commissioner Harold Furchtgott-Roth.

not irreparably prejudiced, the Commission should immediately suspend activation of the 877 toll-free code, much as it did in the case of 888 vanity toll-free numbers.

B. A First-Come, First-Served Mad Rush for Toll Free Numbers Fails to Promote the Commission's Numbering Policy Objectives

A first-come, first-served approach to assignment of toll-free vanity numbers—characterized by a mad rush of fortune seekers trying to unfairly capitalize on the investments of others in existing vanity numbers—does not promote the Commission's numbering policy objectives. The Commission has indicated that its toll-free numbering decisions are guided by the principals that toll-free number allocation should be (1) orderly, (2) efficient and (3) fair.⁸ In the *Fourth Report and Order* it concluded that both a first-come, first-served allocation approach and a right of first refusal approach met these objectives,⁹ but reasoned that a first-come, first-served approach was more orderly, efficient,¹⁰ and fair.¹¹ MCI respectfully disagrees with this conclusion, and urges the Commission to reconsider its decision.

The Commission's arguments supporting adoption of a first-come, first-served approach to toll-free vanity number assignments are flawed. The Commission bases its conclusion that a first-come, first-served approach is more orderly than a right of first refusal approach on the suppositions that "[a]s multiple codes open, there could be multiple subscribers with a right of first refusal for each number in different codes,"¹² and that a first-come, first-served system would "avoid the need to resolve competing claims among subscribers to assignment of particular numbers."¹³ The first supposition is easily remedied by a simple approach that enables

⁸ Fourth Report and Order at ¶ 12.

⁹ *Id.* at ¶ 24.

¹⁰ *Id.* at ¶ 13.

¹¹ *Id.* at ¶ 26.

¹² *Id.* at ¶ 19.

¹³ *Id.* at ¶ 22.

parties to have a right of first refusal only if they hold and use the vanity number in the previously opened toll-free code.

The second supposition is misleading and wrong. A first-come, first-served system does not necessarily reduce the need to resolve competing claims; rather, more likely, it simply delays the need. As the Commission recognized, there are likely to be trademark disputes associated with the assignment of vanity numbers in a first-come, first-served approach that will be handled by the Courts.¹⁴ The fact of the matter is that the first-come, first-served approach does not necessarily reduce disputes. What it does do is enable the Commission to avoid involvement and transfer its responsibilities for fair and efficient number assignments to the courts. Thus, rather than confront and resolve the issue, likely preventing many disputes, the Commission has simply deferred the issue. The end result will likely to be longer disputes, greater uncertainty and much litigation, all leading to inefficient number resource usage.

Moreover, a first-come, first-served approach likely leads to greater confusion and a less orderly allocation process than does an approach that uses a right of first refusal for vanity number assignments. At least one commentator has observed that the allocation process for the 877 numbers was in “disarray.”¹⁵ MCI believes that much of this disarray can be attributed to fortune seekers (and existing vanity number users trying to protect their investments) attempting to secure existing vanity numbers. Thus, a system similar to what was used for 888 numbers, including a right of first refusal for vanity numbers, would necessarily lead to a more orderly assignment process.

The Commission’s arguments supporting the conclusion that a first-come, first-served approach is more efficient than a right of first refusal approach are also overstated. The *Fourth*

¹⁴ *Id.*

¹⁵ Judith Oppenheimer, *877 Opened on April 5, 1998, as Scheduled*, ICB Toll Free News, Apr. 6, 1998.

Report and Order reasoned that a right of first refusal approach is “inefficient because it would lead to more rapid exhaustion of toll-free numbers,”¹⁶ suggesting that some dire consequence may lie right around the corner, or that there are dramatic differences between a first-come, first-served and a right of first refusal approach. A simple analysis suggests that the current 8XX codes set aside for toll-free numbers will ensure the availability of toll-free numbers well into the future, and that a right of first refusal would have little effect on the exhaustion of toll-free numbers.

Under a right of first refusal approach, the supply of toll-free numbers is likely to last for at least 18 years, or until the year 2016. The 888 toll-free code was opened on March 1, 1996¹⁷ and the 877 toll-free code was opened on April 5, 1998,¹⁸ amounting to a period of two years and one month between code openings.¹⁹ Assuming a similar time period between the need for subsequent code openings it would be 12.5 years before the availability of toll-free codes within the 8XX toll-free codes²⁰ exhausted. It is reasonable, however, to assume that the rate of exhaust between the opening of the 888 and 877 codes was faster than might normally occur as a consequence of the large pent-up demand that resulted from the Draconian 800 toll-free number conservation measures and the number usage stimulus caused by the passage of the Telecommunications Act of 1996. Given that the industry recognized the exhaustion of 800 numbers in Spring 1995,²¹ it can be assumed that a more likely pace of toll-free code exhaustion would be

¹⁶ *Fourth Report and Order* at ¶ 17.

¹⁷ *Id.* at ¶ 34.

¹⁸ *Id.* at ¶ 2.

¹⁹ Because 888 vanity numbers were set aside, this time period already takes into effect a right of first refusal approach.

²⁰ Industry has set aside 888, 877, 866, 855, 844, 833, 822, and 811 for toll-free usage. *Fourth Report and Order* at ¶ 2.

²¹ *Id.*

three years per code, thus it would be 18 years, or the year 2016, before toll-free numbers exhaust.²²

Furthermore, the potential efficiency impact of using a first-come, first served basis for allocating toll-free numbers is speculative, and at best extends the life of toll-free numbers within the 8XX toll-free codes by only approximately 0.9 years.²³ Once again this is a conservative estimate, and in all likelihood the extension of the life of toll-free numbers within the 8XX toll-free codes as a result of using a first-come, first-served approach will be even smaller. First, as the Commission recognized, the “incentives of subscribers to engage in a strategy of attempting to reserve equivalent numbers in new toll-free codes as they are opened will diminish over time.”²⁴ Thus, it is likely that fewer and fewer vanity numbers would be set aside, thereby reducing the efficiency differences between a right of first refusal approach and a first-come, first-served approach. Second, under a first-come, first-served approach fortune seekers are likely to hoard many existing vanity numbers simply because of the value associated with them. Thus, even though these numbers are not set aside for use by the existing vanity number holders, they will be quickly allocated and the net effect of the first-come, first-served and right of first refusal approaches will largely be the same.

²² This approximation does not factor in the stimulus impact of the Telecommunications Act of 1996. If this effect was included, it is likely that toll-free number exhaustion would occur even later into the 21st Century.

²³ This estimate is based on the approximation that there are eight million available numbers within each toll-free code, and that there are less than 400,000 vanity numbers within each toll-free code. Each toll-free code theoretically has 10 million codes available. However, as a result of assignment limitations (e.g., 800-000-XXXX, 800-555-XXXX are not currently assignable.), only approximately 8 million numbers are available. The estimate for the number of vanity numbers was based on the fact that only 374, 199 vanity numbers were reserved in the 888 code. “Only 374,199 numbers were originally set aside out of approximately 8 million numbers available in the 888 code.” *Fourth Report and Order* at ¶ 21.

²⁴ *Id.* at ¶ 23. This statement appears to contradict its prior finding in the *Fourth Report and Order* that “the likelihood of more rapid depletion [of toll-free numbers] would increase as additional toll-free codes are made available because it is likely that a growing percentage of numbers in each code would be taken by subscribers exercising their right of first refusal.” *Id.* at ¶ 17. The contradictory nature of these findings further bring into question the Commission basis for its adoption of a first-come, first-served approach.

Finally, the Commission's conclusion that a first-come, first-served allocation process is more fair than a right of first refusal approach is myopic because it ignores all relevant aspects of fairness. The Commission states that a first-come, first-served assignment process best serves its "goal to assign toll-free numbers fairly because it does not discriminate against new subscribers."²⁵ MCI contends that not only is it *unfair*, but is manifestly *unjust* to permit a third-party speculator to obtain a vanity number from an existing user of that number merely because the speculator gets lucky during a mad rush assignment procedure. As Commissioner Furchtgott-Roth stated in his dissenting opinion, a first-come, first-served approach simply "does not provide adequate protection for those entities that have already invested heavily in the marketing of their toll-free vanity numbers, and may discourage others from investing similarly in the future."²⁶ Surely, such a result should not be condoned by the Commission's numbering policy objectives.

CONCLUSION

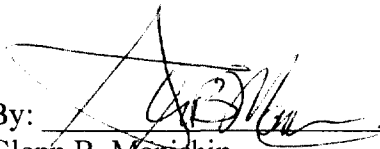
For all these reasons, the Commission should suspend further activation of vanity numbers within the 877 toll-free code and adopt a right of first refusal approach for vanity number assignment within the 877 and subsequent toll-free codes. At the very least, the

²⁵ *Fourth Report and Order* at ¶ 25.

²⁶ *Id.*, Dissenting Statement of Commissioner Harold Furchtgott-Roth.

Commission should adopt a right of first refusal approach for the assignment of vanity toll-free access numbers within the 877 and subsequent toll-free codes.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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